Supreme Court, U.S.
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No. 09-1245

IN THE
Supreme Court of The United States

SHANNON C. HORITA,

Petitioner,

v.

KAUAI ISLAND UTILITY COOPERATIVE,
A HAWAII CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals correctly refuse to reach Petitioner's claims of equitable tolling and/or equitable estoppel because she failed to raise them below before the district court?

2. Did the court of appeals correctly apply *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) to determine that Petitioner's Title VII claim was barred by her failure to timely file an administrative charge, or should it instead have applied a rule adopted by a minority of the state courts interpreting state law and raised for the first time by Petitioner in her Petition for Writ of Certiorari?

RULE 29.6 DISCLOSURE STATEMENT

Respondent KAUAI ISLAND UTILITY COOPERATIVE, a Hawaii corporation, has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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JURISDICTION

Respondent Kauai Island Utility Cooperative ("Respondent" or "KIUC") agrees with Petitioner Shannon Horita's ("Petitioner" or "Horita") Statement of Jurisdiction, set forth in her Petition for Writ of Certiorari, filed on April 6, 2010 and placed on the docket April 15, 2010. However, Respondent notes that Petitioner's Petition for Panel Rehearing and Rehearing En Banc was filed on November 20, 2009, not November 26, 2009.

COUNTER-STATEMENT

This case arose from the elimination of Petitioner's position as an administrator in Respondent's Human Resources Department. Petitioner was notified of the decision to eliminate her position on September 28, 2005 and also on October 5, 2005. She did not file her Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Hawaii Civil Rights Commission ("HCRC") until September 21, 2006, approximately 350 days after she had been notified of the decision. The district court granted Respondent's motion for summary judgment because Petitioner failed to timely file an administrative charge of discrimination and the court of appeals affirmed. The court of appeals denied Petitioner's request for panel rehearing and rehearing *en banc*.

1. Factual Background Relevant to the Petition. Petitioner was employed by Respondent as an administrator in its Human Resources Department.

Petitioner initially began in January 2004 as a temporary clerk in a position that was only intended to last two to three weeks. In April 2005, Petitioner considered submitting her resignation because she had work commitments with another company. Respondent's CEO Dutch Achenbach ("Achenbach") allowed Petitioner to instead take a leave of absence, a benefit which Petitioner admits Respondent had no obligation to provide.

At a company meeting on April 19, 2005, Achenbach announced that the National Rural Electric Cooperative Association ("NRECA") would be conducting an organizational assessment. Petitioner knew that as a result of the organizational assessment some people might be moved into different positions and that she could be one of those people. Darnney Proudfoot ("Proudfoot"), Respondent's Vice President of the Human Resources Department, told Petitioner that Achenbach had said that he might not be able to keep Petitioner's position, but Proudfoot told Petitioner that she was trying to justify another full time position. The new full time position of Human Resources Administrator was subsequently created. Petitioner applied for, and in June 2005 she was offered, the position at a salary of $50,042 per year graded at exempt level 9. By letter dated June 30, 2005, that offer was revised downward to $40,709 and Petitioner was told that the grade level was to be determined at a later date. Petitioner claims that Achenbach commented to Petitioner's co-worker that Petitioner walked like a "sumo-person."

On September 2, 2005 Achenbach advised Petitioner that the Human Resources Department would be outsourced at the recommendation of NRECA. Petitioner contends that Achenbach also stated that if the Human Resources Department were not outsourced, then Petitioner could regain her job. On September 28, 2005, Petitioner received a letter from Achenbach stating that her position would be eliminated effective December 31, 2005. Achenbach sent Petitioner another letter on October 5, 2005 again advising her that her position would no longer exist as of January 1, 2006. In his October 5, 2005 letter Achenbach offered Petitioner the opportunity to transfer to another position in the Member Services Department at the same rate of pay that she was earning at that time. Petitioner declined the offer. Although a number of positions were later posted, Petitioner did not apply for any of them.

Petitioner contends that on October 12, 2005 she and a co-worker were instructed to relocate their work stations to make room for the legal department. Petitioner was given a written warning on November 18, 2005 for being unhelpful and unfriendly, a characterization of her conduct that she has not disputed.

After being given the written warning, Petitioner claimed that she was experiencing stress and did not return to work. On or about December 20, 2005, Petitioner was reminded by letter that she would be laid off effective January 1, 2006.

2. Proceedings Below. Respondent filed its Motion for Summary Judgment on May 21, 2008. In Petitioner's August 1, 2008 Memorandum in Opposition to [Respondent's] Motion for Summary Judgment, Petitioner never raised the issues of equitable tolling and/or equitable estoppel. (Respondent's ["Resp."] Brief, at Appendix ["App."] 1a-14a). The district court granted Respondent's Motion for Summary Judgment and filed its Order Granting [Respondent's] Motion for Summary Judgment on August 22, 2008. The district court applied the rule articulated by the United States Supreme Court in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980), and held that the limitations period began to run no later than October 5, 2005, the date that Petitioner was notified that her position would be eliminated. The district court concluded that Petitioner had not timely filed a charge of discrimination.

The court of appeals affirmed the district court's grant of summary judgment. The court of appeals did not reach Petitioner's claim of equitable tolling or equitable estoppel, noting that Petitioner "did not make these claims explicitly to the district court. Had she done so, [Respondent] might have introduced evidence to dispute the equitable claims. Because [Petitioner] failed to raise these claims below, we do not reach them now." (Petitioner's ["Pet."] Brief, at Appendix ["App."] 3a). The court of appeals denied Petitioner's request for panel rehearing and rehearing *en banc*. (Pet. Brief, at App. 20a).

SUMMARY OF ARGUMENT

Petitioner asserted in her Complaint that she was discriminated against in violation of Title VII.[1] To proceed with a statutory discrimination claim under Title VII, a plaintiff must file an administrative charge of discrimination within 300 days. The limitations period begins to run when the employment decision is made and the employee is notified. *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). It is undisputed that Petitioner was notified by letter dated September 28, 2005 and again by memorandum dated October 5, 2005 that her position would be eliminated effective December 31, 2005. Petitioner's claim under federal law is therefore time-barred because both dates fall outside the limitations period.

Petitioner now argues that her claim is not time-barred because (1) the limitations period should be equitably tolled or equitably estopped to mitigate the harsh effects of *Ricks* and *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981), and (2) this Court should overturn *Ricks* and *Chardon*, and instead should apply a rule followed by a minority of state courts which have held that the date of termination and not notification of termination should be the date that the statute of limitations begins to run.

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[1] Petitioner also asserted a state law claim under Chapter 378 of the Hawaii Revised Statutes. However, she is not appealing this claim in her Petition for Writ of Certiorari. (Pet. Brief, at i, 1-30).

This Court should not address Petitioner's first argument because the court of appeals correctly refused to address the arguments of equitable tolling and equitable estoppel as Petitioner had not raised them before the district court. Petitioner's second argument also fails because the district court applied and the court of appeals affirmed the application of the well-established precedent of *Ricks* holding that the limitations period begins to run when the employment decision is made and the employee has been notified of the decision. Furthermore, this Court should not follow a rule adopted by a minority of state courts interpreting state law and raised for the first time by Petitioner in her Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals Correctly Refused to Reach Petitioner's Claims of Equitable Tolling and/or Equitable Estoppel Because Petitioner Failed to Make These Claims Explicitly to the District Court

Petitioner never argued before the district court that the doctrines of equitable tolling and/or estoppel should apply. (Resp. Brief, at App. 1a-14a). The Court of Appeals did not reach Petitioner's claims of equitable tolling and/or equitable estoppel, as it determined that Petitioner "did not make these claims explicitly to the district court." (Pet. Brief, at App. 3a).

Absent exceptional circumstances, this Court will not decide questions not raised or resolved below. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 47 L. Ed. 2d 701 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]."); *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not pressed upon below."). Here, any argument that Petitioner's claims should be equitably tolled or equitably estopped has been waived as a result of her failure to raise the argument below. *See Singleton*, 428 U.S. at 120. Petitioner has not presented any exceptional circumstances that explain why she was unable to raise her arguments with the district court. Therefore, the court of appeals correctly refused to reach this argument.

B. The Court of Appeals Properly Applied Precedent in Affirming Summary Judgment in Favor of Respondent on the Basis that Petitioner's Title VII Claim was Barred by Her Failure to Timely File an Administrative Charge

Petitioner urges this Court to overturn *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) and *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981). Under *Ricks*, Petitioner's charge of discrimination was clearly untimely because it was filed more than

300 days after she had notice of the termination decision.

With a novel argument never raised with the district court and never raised with the Ninth Circuit Court of Appeals, Petitioner urges this Court to apply a rule followed by a minority of state courts which have held that the date of termination and not notification of termination should be the date that the statute of limitations begins to run. (Pet. Brief, at 24-29). In making this argument, Petitioner fails to offer any coherent argument in favor of abandoning well established Supreme Court precedent that has been consistently followed by the federal courts of appeal.

For the first time in her Petition, Petitioner argues that the limitations period began to run on December 31, 2005, her termination date. At every prior stage in this litigation, Petitioner has argued that a different date triggered the running of the limitations period. (Resp. Brief, at App. 1a-49a; Pet. Brief, at App. 10a-19a). Petitioner previously argued with the lower courts that the statute began to run on December 20, 2005, the date of the letter from Respondent reminding Petitioner that she would be laid off as of January 1, 2006. (*Id.*) Any argument that the date of termination rule followed by a minority of state courts should now apply has been waived as a result of Petitioner's failure to raise the argument below. *See Singleton*, 428 U.S. at 120 ("It is the general rule, of course, that a federal appellate court does not consider an issue not pressed upon below"); *Youakim*, 425 U.S. at 234 (internal and

external citations omitted) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court ... 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed'").

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 07-00357 JMS BMK

SHANNON C. HORITA,

Plaintiff,

v.

KAUAI ISLAND UTILITY
COOPERATIVE, a Hawaii corporation,

Defendant.

MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT

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II.
ARGUMENT

A. Summary Judgment, Generally

Summary Judgment is proper:

> if no factual issues exist for trial. The party opposing summary judgment must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991) (quoting, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986)).

The evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in the light most favorable to the nonmoving party. *Id.* (quoting, *Anderson*, 930 U.S. at 255, 106 S.Ct. at 2513).

Generally, a plaintiff in an employment discrimination action needs to produce very little evidence in order to overcome the employer's motion for summary judgment. *Chuang v. Univ. of California Davis*, 225 F.3d 1115 (9th Cir. 2000). This

is because the ultimate question is one that can only be resolved through a searching inquiry, one that is most appropriately conducted by a fact-finder, upon a full record. *Id.* at 1124. Once plaintiff has established a prima facie case, the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating some permissible reason for the adverse action. *Id.*

B. Title VII, Generally

1. Race and National Origin

Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq,* prohibits racial and national origin discrimination by an employer against any individual with respect to his compensation, terms, conditions or privileges of employment. *See,* 42 U.S.C. § 2000e 2(a) (1).

A disparate treatment claim under Title VII uses the three-step *McDonnell Douglas* test. The plaintiff must first establish a prima facie case of discrimination consisting of the following elements: (1) plaintiff belongs to a protected class; (2) he was performing his job satisfactorily; and (3) he suffered an adverse employment action or was treated less favorably than others. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 36 L.Ed. 2d 668, 93 S.Ct. 1817 (1973). If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment decisions. *Id.* Once the defendant satisfies this burden, the plaintiff must demonstrate that the employer's alleged reason for

the adverse employment decision is a pretext for a discriminatory motive. *Id.* at 804.

To preclude summary judgment, the employee, even if he establishes a prima facie case, must come forward with specific, substantial evidence of pretext *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 888 (9th Cir. 1994). "In other words, the plaintiff must tender a genuine issue of material fact as to pretext in order to avoid summary judgment." *Id.* at 890 (internal quotations and citation omitted). A claim of disparate treatment typically requires that the plaintiff present direct or circumstantial proof of a discriminatory motive. *Pejic v. Hughes Helicopters, Inc.,* 840 F.2d 667, 672 (9th Cir 1988). Evidence that a plaintiff was treated differently than others outside of his class is circumstantial proof of discriminatory motive. *Id.*

i. Race-Based Remarks

In *Galdamez v. Potter,* 415 F.3d 1015 (9th Cir. 2005), a Title VII race and national origin harassment case, the Ninth Circuit noted that there are no "talismanic expressions" of racial animus necessary to sustain a harassment claim, and recognized that racially charged "code words" may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications. *Id.* at 1024 n.6; *see also, Mustafa v. Clark County School Dist.,* 157 F.3d 1169, 1180 (9th Cir. 1998)(Discriminatory remarks are relevant evidence that, along with other evidence, can create a strong inference of intentional

discrimination.)

In *Galdamez,* the Ninth Circuit noted that the term "redneck" appeared several times in the record of that case, and can suggest racial hostility toward plaintiff-employee, a Hispanic born in Honduras. *Galdamez,* 415 F.3d at 1024; *see also, State v. Kuhia,* 105 Haw. 261, 96 P.3d 590, n.4 (Haw. App. 2004), citing, Mary K. Pukui and Samuel H. Elbert, Hawaiian Dictionary 58 (1986) ("Haole" is a Hawaiian word for "Caucasian.")

2. Gender

In the recent case of *Davis v. Team Electric,* 520 F.3d 1080 (9th Cir. 2008), the Court found that a female electrician had established a prima facie case of gender discrimination, where unlike her male co-workers, she was prohibited from entering a trailer to take breaks or to talk with her superintendent about work matters and she was ignored by her supervisors when she attempted to communicate with them by radio. The court found that such actions together with discriminatory work assignments, materially affected the terms and conditions of her employment.

C. Horita's Discrimination Complaint to the Equal Employment Opportunity Commission Was Timely

Defendant has alleged that Horita's complaint is untimely in that it was not filed 300 days after June 30, 2005, the date when Achenbach effected the reduction of Horita's compensation. However, the

Defendant acknowledges that on November 18, 2005, Baldwin served Horita with an Employee Counseling Report and that on December 20, 2005, Baldwin sent Horita a termination notice stating that Horita's position with KIUC had been eliminated and that she would be laid off, effective January 1, 2006. Horita filed her discrimination complaint with the Equal Employment Opportunity Commission on September 10, 2006. (Ex. "X" to Concise Statement.)

Defendant's reliance on *Ledbetter v. The Goodyear Tire and Rubber Co., Inc.,* 127 S.Ct. 2162 (Sup. Ct. 2007) is misplaced. In *Ledbetter,* the complainant did not assert that the relevant Goodyear decision makers acted with discriminatory intent during the EEOC charging period or when they denied her a raise within 300 days of her discrimination complaint. Instead, the Complainant argued that her paychecks would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period.

Horita would submit that the Supreme Court's holding in *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S.Ct. 2061 (Sup. Ct. 2002) is applicable to the instant case. Rejecting the Appeals Court's holding that continuing violations for "serial violations" was the appropriate test, the Supreme Court stated in pertinent part:

> Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete

> discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.

536 U.S. 101 at 113.

D. Horita's Evidence of Discriminatory Bias

Horita would submit that she has presented sufficient evidence to prove that the treatment she received at KIUC, culminating with her termination on December 20, 2005, was the result of race, national origin and gender bias. William Schmidt has submitted a Declaration stating that Achenbach made racial and sexist statements about persons on a daily basis, that Achenbach made negative statements about Japanese men and women, referencing their ethnic backgrounds and had targeted Darnney Proudfoot, Marcia Shimokawa and Shannon Horita for termination.

Faye Akasaki has testified that she is a Japanese American woman who retired as the Vice President-Membership Services. Ms. Akasaki has testified that she was informed by a KIUC employee that Achenbach called her a "slanty eye Jap." Akasaki finally has testified that her Department did not receive raises in 2005, a fact that factored into her

decision to retire.

Darnney Proudfoot, a Chinese-American woman, the former Vice President, Human Resource Department, has testified that in June 2005, she was told by Achenbach that she need not come to work as her employment contract with KIUC would not be extended. Ms. Proudfoot was told that the reason for the non-renewal of her contract was that the Human Resource Department would be outsourced.

Ms. Proudfoot left KIUC on a severance package in October 2005. The Human Resource Department was not outsourced. Ms. Proudfoot's replacement was hired in December 2005.

Kathy Williams, a Caucasian employee of KIUC was told by Achenbach that she would not get ahead in KIUC because she was the "wrong color." Achenbach, like Williams, is Caucasian.

Horita has offered evidence that her pay was reduced approximately $10,000.00 in June 2005. She was required to vacate her office in October 2005 and her work station was placed in the reception area of KIUC office. On November 2, 2005, she was ordered to do janitorial work, and after Achenbach told Baldwin that he had received complaints that Horita was unfriendly and not helpful to KIUC employees, she was disciplined. Finally, on December 20, 2005, despite the fact that the Human Resource Department was not going to be outsourced, KIUC eliminated Horita's position and terminated her.

In *Estes v. Dick Smith Ford*, 856 F.2d 1097 (8th

Cir. 1998), the Appeals Court found that it was probative to a claim of racial discrimination evidence that the employer had excluded blacks from its workforce, that the employer had fired two other employees because of their ages, that the employer had treated white customers more favorably than black customers and that the employer's managers had referred to blacks and Complainant as "damn niggers." Likewise in *White v. Honeywell, Inc.* 141 F.3d 1270 (8th Cir. 1998), the Court held that it was error for the trial court to exclude the statement, "If the dumb nigger doesn't like it she can sign out," stating that though the statement was not actionable in that it fell outside the time limitations, the trial court committed reversible error in excluding it at trial. *See also*, *Robinson v. Runyon*, 149 F.3d 507 (6th Cir. 1998).

In *Kientzy v. McDonnell Douglas*, 990 F.2d 1051 (8th Cir. 1993) the Court of Appeals, affirming a jury verdict of discrimination held that evidence that the supervisor had deviated from the practice and procedure that he had utilized for disciplining male security guards, when he disciplined a female guard, was probative to establish discriminatory bias.

E. Horita's Discipline and Termination Can Be Traced to Harry Achenbach

Harry Achenbach was the CEO of KIUC. Achenbach made the decision to propose the outsourcing of the Human Resource Department, which was used to justify the severance agreement with Darnney Proudfoot, a Chinese American

woman. Further, Achenbach made the decision to reduce Horita's salary by approximately $10,000.00 after he had initially approved it.

Achenbach reported employee complaints to Baldwin, which motivated her to issue a Employee Counseling Report on Horita on November 18, 2005. Finally, the termination notice sent to Horita referred to Achenbach's prior decision to eliminate Horita's position and was sent at a time when the Human Resource Department was not being outsourced.

Achenbach called Akasaki a "slanty eye Jap bitch," referred to Horita as a "little sumo wrestler" and made negative statements about Japanese men and women.

In *Shager v. Upjohn Co.*, 913 F.2d 1522 (7th Cir. 1990), Judge Posner coined the term "cat's paw" to reference a case in which the actions of a discriminatory manager is carried out by third party, stating:

> All that follows, though, is that if Lehnst had fired Shager, Asgrow would be liable whether or not anyone else connected with the company was at fault. Lehnst did not fire Shager; the Career Path Committee did. If it did so for reasons untainted by any prejudice of Lehnst's against older workers, the causal link between that prejudice and Shager's discharge is severed, and Shager cannot maintain this suit even if Asgrow is fully liable for Lehnst's wrongdoing. But if Shager's

evidence is believed, as in the present posture of the case it must be, the committee's decision to fire him was tainted by Lehnst's prejudice. Lehnst not only set up Shager to fail by assigning him an unpromising territory but influenced the committee's deliberations by portraying Shager's performance to the committee in the worst possible light. Lehnst's influence may well have been decisive. The committee's deliberations on the question whether to fire Shager were brief, perhaps perfunctory; no member who was deposed could remember having considered the issue. A committee of this sort, even if it is not just a liability shield invented by lawyers, is apt to defer to the judgment of the man on the spot. Lehnst was the district manager; he presented plausible evidence that one of his sales representatives should be discharged; the committee was not conversant with the possible age animus that may have motivated Lehnst's recommendation. If it acted as the conduit of Lehnst's prejudice -- his cat's-paw -- the innocence of its members would not spare the company from liability. For it would then be a case where Lehnst, acting within (even if at the same time abusing) his authority as district manager to evaluate and make recommendations concerning his subordinates, had procured Shager's discharge because of his age. Lehnst would have violated the statute, and his violation would be imputed to Asgrow. The committee would be out of the picture. It would no more be a

> nonconductor, insulating the company from liability for Lehnst's misconduct, than would be the secretary who typed Shaper's discharge papers knowing nothing of the age discrimination that lay behind the discharge.

913 F.2d 398 at 405, (citations omitted).

The proposition that an employer can be liable for the discriminatory bias of a manager who acts through a another manager has been re-affirmed by cases which have adopted the "cat's paw" doctrine. In *Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C.C.A. 1998) the Appeals Court held that the trial court had improperly excluded evidence of the complainant's supervisor's bias against women, where the employer had conceded that the supervisor had participated in every stage of the process that led to the complainant's termination. Finally, in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), the Appeals Court reversed an order granting summary judgment to an employer who established that the human resource official who terminated the complainant was not acquainted with the complainant nor had knowledge of his race. The Complainant had established that the human resources official relied exclusively on information provided by complainant's immediate supervisor who not only knew complainant's race, but also been shown to have treated blacks unfavorably.

III.
CONCLUSION

Plaintiff Shannon Horita has established that she was subjected to a disciplinary action initiated at the behest of Harry "Dutch" Achenbach. Horita has further established that Achenbach made the decision to eliminate Horita's employment position at a time when the elimination of Horita's job was no longer justified. Horita was terminated by letter dated December 20, 2005.

Additionally, Horita has proffered evidence which confirms that Achenbach made racist and sexist statements about Japanese women and against herself. Finally, Horita has proffered evidence showing that Achenbach not only treated minority women disparately, but in the instant case, targeted Darnney Proudfoot, Marcia Shimokawa and Shannon Horita, all non-white women, for termination and did in fact cause their termination.

For the foregoing reasons, Horita requests that the instant motion be denied.

DATED: Honolulu, Hawaii, August 1, 2008.

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No. 08-17166
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Shannon C. Horita,
Plaintiff-Appellant,
v.
Kauai Island Utility Cooperative,
Defendant-Appellee.

D.C. No. 07-00357 JMS BMK
District of Hawaii, Honolulu

Appeal from Judgment in a Civil Case in the United States District Court for the District of Hawaii

PLAINTIFF-APPELLANT'S OPENING BRIEF

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

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A. Title VII Statute of Limitation ("SOL"), Generally

B. The SOL for Horita's Title VII Claims Did Not Start to Run until December 20, 2005, When She Was Terminated with No Right to Secure Another Job with KIUC

C. Horita Was Subjected to Emotional Distress as a Result of the Issuance of the November 18, 2005 Employee Counseling Report and December 20, 2005 Termination Letter to Horita, and

Therefore under Hawaii Law May File a Civil Action Within Two Years after the Cause of Action Accrued

D. Alternatively, If the Time Limitation to File the EEOC Charge Began to Run Before December 20, 2005, There Is an Issue of Whether Equitable Tolling or Estoppel Applies Here Which Cannot Be Resolved by Summary Judgment

VII. CONCLUSION

* * * * *

V.

SUMMARY OF THE ARGUMENT

Horita contends that the District Court erred in granting summary judgment in KIUC's favor with regards to Horita's Title VII Claims that she did not timely exhaust her administrative remedies. Horita contends that the 300-day limitation period to file her EEOC Charge began on December 20, 2005, the date of KIUC's letter which notified Horita of her termination which makes her EEOC Charge filed on September 21, 2006, timely.

Additionally, under Hawaii Law, Horita may file a civil action two years after the cause of action accrued based upon infliction of emotional distress from unlawful employment discrimination by the issuance of the November 18, 2005 Employee Counseling Report and the December 20, 2005 termination letter to Horita. *See*, HRS Sections 386-5, 657-7.

* * * * *

VII.

ARGUMENT

A. Title VII Statute of Limitation ("SOL"), Generally

42 U.S.C. § 2000e-5, Enforcement provisions, states in part:

* * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * *

Hawaii is a designated "deferral state" which means the EEOC defers jurisdiction to the HCRC. Therefore, the 300-day limitation period applies. 29 C.F.R. §§ 1601.13, 1601.70, 1601.80.

B. **The SOL for Horita's Title VII Claims Did Not Start to Run until December 20, 2005, When She Was Terminated with No Right to Secure Another Job with KIUC**

In *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 153 L.Ed. 2d 106, 122 S.Ct. 2061 (2002), on February 27, 1995, plaintiff–employee filed a charge of discrimination and retaliation against his former employer with the EEOC and cross-filed with the California Department of Fair Employment and Housing. Plaintiff alleged that during the time period that he worked for defendant he was "consistently harassed and disciplined more harshly than other employees on account of his race." The EEOC issued to plaintiff a Notice of Right to Sue on July 3, 1996, and plaintiff filed his lawsuit on October 2, 1996. While some of the allegedly discriminatory acts had occurred within 300 days of the time the employee filed the charge with the EEOC, many had occurred prior to that time period. *Id.* at 106-107.

The Supreme Court in *Morgan* held that an employee who initially files a charge of discrimination with a state agency in California must file a charge with the EEOC within 300 days of the alleged unlawful employment practice in order to

preserve the claim for a subsequent civil action under 42 U.S.C. § 2000e-5(e)(1). *Id.* at 109. The Supreme Court explained:

> Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the . . . 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.
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> As we have held, however, this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel.
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> * * *
>
> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination . . . constitutes a separate actionable 'unlawful employment practice.' Morgan can only file a charge to cover discrete

> acts that 'occurred' within the appropriate time period.

Id. at 113-114 (citations omitted).

Also, the Court in *Morgan* stated that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party, therefore, must file a charge within 300-days of the date of the act or lose the ability to recover for it." *Id.* at 110.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, _____ U.S. _____, 127 S.Ct. 2162, 167 L.Ed. 2d 982 (2007), plaintiff-employee worked for defendant - employer from 1979 until 1998. During much of this time, salaried employees were given or denied raises based on their supervisors' evaluation of their performance. In March 1998, plaintiff submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July 1998 she filed a formal EEOC charge. After taking early retirement in November 1998, plaintiff commenced her civil action in which she asserted, among other claims, a Title VII pay discrimination claim. *Id.* at 2165.

On appeal, defendant contended that plaintiff's pay discrimination claim was time barred with respect to all pay decisions made prior to September 26, 1997, or 180-days before the filing of her EEOC questionnaire; and that no discriminatory act relating to plaintiff's pay occurred after that date. The Eleventh Circuit in *Ledbetter* held that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay

decision that affected the employee's pay during the EEOC charging period. *Id.* at 2166.

The Supreme Court in *Ledbetter* considered whether a plaintiff's claim for employment discrimination under Title VII was time-barred when the discrete acts of pay discrimination occurred outside the limitations but had an effect during the limitations period. The Court in *Ledbetter* stated that before challenging an unlawful employment practice under Title VII, an employee must first file a timely EEOC charge. *Id.* at 2166. Such a charge must be filed within 300 days after the alleged unlawful employment practice occurred or else the employee may not challenge the practice in court. *Id.* at 2166-67. The Court in *Ledbetter* emphasized the need to identify the specific employment practice that is at issue when considering whether an EEOC charge was filed on time, noting that "[t]he EEOC charging period is triggered when a discrete unlawful practice takes place, . .. [but] current effects alone cannot breathe life into prior, uncharged discrimination." *Id.* at 2169. An employment practice is a "discrete act or single occurrence that takes place at a particular point in time." *Id.* (internal quotation marks omitted).

The Supreme Court in *Ledbetter* explained:

> We have previously held that the time for filing a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) begins when the

> discriminatory act occurs. We have explained that this rule applies to any `[d]iscrete ac[t]' of discrimination, including discrimination in 'termination, failure to promote, denial of transfer, [and] refusal to hire.' *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 114, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). Because a pay-setting decision is a `discrete act,' it follows that the period for filing an EEOC charge begins when the act occurs. Petitioner, having abandoned her claim under the Equal Pay Act, asks us to deviate from our prior decisions in order to permit her to assert her claim under Title VII. Petitioner also contends that discrimination in pay is different from other types of employment discrimination and thus should be governed by a different rule. But because a pay-setting decision is a discrete act that occurs at a particular point in time, these arguments must be rejected. We therefore affirm the judgment of the Court of Appeals.

Id. at 2165.

Here, the District Court determined that Horita "knew by at least October 5, 2005 that her employment would cease on January 1, 2006 because her position was eliminated and she refused Defendant's offer of another position. Thus, she had actual knowledge of the adverse action by October 5, 2005." (*See*, EOR Vol. 1 at 12). Additionally, the District Court rejected Horita's contension that her EEOC complaint was timely as to the December 20,

2005 notice based upon Achenbach's September 2, 2005, statements that "if Human Resources were to remain in-house we would be able to get our jobs back. Pl.'s Decl. ¶ 17. (*See*, EOR Vol. 1 at 12). Also, the District Court determined that there was no indication that the elimination of Horita's position was related to the Human Resources department being outsourced. (*See*, EOR Vol. 1 at 12-13).

In Horita's Declaration in support of her of opposition memorandum to KIUC's Motion, she stated in part:

> 7. On April 19, 2005, Achenbach informed KIUC employees that he intended to reorganize KIUC. Achenbach said that the National Rural Electric Cooperative Assessment (NRECA) would conduct an organizational assessment. Achenbach also stated that the Human Resources Department costs too much and that it should be outsourced.
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> * * *
>
> 17. On September 2, 2005, Achenbach met with the Human Resources staff and informed us that the Human Resources Department would be "outsourced" as recommended by the assessment done by NRECA. Achenbach mentioned that a cost savings of $500,000.00, which made it favorable to outsource Human Resources. Achenbach also said that the Human Resources Administrator positions Shimokawa and I held were both downgraded

from a Grade 9 to a Grade 5. At the time, our positions were the only positions in the entire company that were downgraded. Achenbach stated that if Human Resources were to remain in-house, we would be able to get our jobs back.

18. To this day, Human Resources remains in-house with none of the Human Resources responsibilities outsourced.

* * *

30. On November 19, 2005, I saw my physicians for anxiety symptoms which I developed in November 2005, whereby I would experience uncontrollable shaking and difficulty in breathing.

31. I submitted physicians' notes indicating that I was unable to work from November 21, 2005 to January 3, 2006. Attached as Exhibit "M" are three "Medical Excuse Forms" which I received from my treating physicians for my symptoms which I experienced in November 2005 . . .

32. On December 13, 2005, KIUC announced that Jackie Cachero was appointed the Employee Services Coordinator's position on December 12, 2005. Exhibit "N" is copy of the KIUC announcement and indicates that Ms. Cachero would have the same functions which I had been performing as a Human Resources Administrator.

> 33. I received a letter dated December 20, 2005 from Ms. Baldwin advising me that effective January 1, 2006 I would be laid off from Kauai Island Utility Cooperative. On January 1, 2006 my employment with Kauai Island Utility Cooperative was terminated.

(*See*, EOR Vol. 2 at 34, 37, 40-41, 109-112; *See also*, CR at 80, 95).

Also, the December 20, 2005 letter from Baldwin to Horita stated in part:

> As Mr. Achenbach informed you in his letter of September 28, 2005, your position in Human Resources will be eliminated December 31, 2005. Therefore, effective January 1, 2006 you will be laid off.
>
> You were offered the opportunity to apply and interview for various open positions. You have chosen not to apply for any positions.
>
> If you recover within 60 days of your lay-off, you may be recalled based on KIUC's operational needs, your work performance and your qualifications. If you are released from your physician's care and are able to work during this time period, please inform us of your availability.

(*See*, EOR Vol. 2 at 113).

Horita contends the District Court erred in its determination that she had "actual knowledge" that

her position would be terminated on January 1, 2006 at least by October 5, 2005, and there was no indication that the elimination of her job was related to the Human Resources department being outsourced. Unlike the plaintiff in *Ledbetter* who claimed that each paycheck she received under a facially neutral pay scheme was part of one continuing violation of federal law, Horita contends that KIUC's letter of December 20, 2005, terminating her employment effective January 1, 2006, foreclosed any possibility of continuing her employment, notwithstanding Human Resources remaining in-house, constituted a new and discrete act of discrimination against her. *Morgan, supra.*

As noted above, Achenbach told the Human Resources staff on September 2, 2005 that the Human Resources Department would be outsourced to save costs per the NRECA recommendation, and that Shimokawa and Horita would be downgraded to Grade 5. However, Achenbach also stated that "if Human Resources were to remain in-house, [Horita and Shimokawa] would be able to get our jobs back." (*See*, EOR Vol. 2 at 37).

Additionally, on December 13, 2005, KIUC announced Jackie Cachero was appointed Employee Services Coordinator on December 12, 2005, which was Proudfoot's job. Proudfoot was Horita's supervisor. Although the title was different, Horita noted that Cachero would be performing the same functions as she did as a Human Resources Administrator. Horita contends that she expected to retain her job in light of Human Resources

remaining in-house with none of its responsibilities outsourced, and the appointment of Cachero. (*See*, EOR Vol. 2 at 37, 40-41, 112).

Furthermore, Schmidt, who was KIUC's Chief Financial Officer, stated that he told Achenbach that he could not outsource all of the Human Resources' functions, duties and responsibilities, and that it was not industry practice to do so. (*See*, EOR Vol. 2 at 64-65). Proudfoot testified that she prepared a report that essentially determined that outsourcing would be impracticable due to the way payroll is handled which is not part of Human Resources, as well as handling benefits which was part of Human Resources. (*See*, EOR Vol. 2 at 143).

The District Court raised that point that Horita did not seek any position within KIUC before her job would be terminated. However, as noted above, on October 4, 2005, Horita received an offer from KIUC for the Administrative Assistant position in Member Services, which paid less than what she was earning. Although Horita declined the job offer, she sent an October 4, 2005 memorandum to Achenbach noting that he mentioned the existence of 17 new positions at the September 2, 2005 Human Resources Department meeting, and that she would be would be willing to consider these positions as they became available. (*See*, CR at 1; EOR Vol. 2 at 38, 105-106, 223).

Moreover, Horita contends that she was unable apply for another position as she was placed on sick leave per doctor's order from November 21, 2005 to

January 3, 2006 and submitted doctors' slips to KIUC. (*See*, EOR Vol. 2 at 40, 109-111).

KIUC recognized that Horita was out sick as its December 20, 2005 letter to Horita noted that if she is released from her physician's care and is able to work within 60-days of her lay-off, to let KIUC know of her availability. (*See*, EOR Vol. 2 at 113).

Horita therefore contends that KIUC's December 20, 2005 letter advising her that her job would be terminated on January 1, 2006 was a new and discrete act that triggered the 300-day period for Horita file her EEOC Charge, as well as the 180-day period to file her HCRC complaint, which makes her EEOC Charge filed on September 21, 2006 timely.

C. **Horita Was Subjected to Emotional Distress as a Result of the Issuance of the November 18, 2005 Employee Counseling Report and December 20, 2005 Termination Letter to Horita, and Therefore under Hawaii Law May File a Civil Action Within Two Years after the Cause of Action Accrued**

Hawaii Revised Statutes ("HRS") Section 386-5, the exclusivity of remedies provision under Hawaii's workers' compensation law, states:

> The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next

> of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto, in which case a civil action may also be brought.

The Hawaii Supreme Court has held that an employee may bring an action against her employer for intentional infliction of emotional distress caused by discrimination in violation of HRS Section 378-2, and that such an action is not barred by the exclusivity provision of HRS Section 386-5. See, *Takaki v. Allied Mach. Corp.,* 87 Haw. 57, 67 (Haw. 1998); *see also, Nelson v. Univ. of Hawaii,* 97 Haw. 376, 395 (Haw. 2001)(Inasmuch as: (1) the plain language of the exception in Section 386-5 applies to claims for "infliction of emotional distress" without limitation; (2) the exception is a remedial provision that must be construed liberally; and (3) the legislative history does not support limiting the exception to intentional infliction of emotional distress claims, the exclusive remedy provision of the workers' compensation law does not bar claims for negligent infliction of emotion distress related to sexual harassment); *Black v. City & County of Honolulu,* 112 F.Supp. 2d 1041, 1048 (D. Haw. 2000)(Where the plaintiff asserts that her employer's negligence resulted in sexual harassment, the negligence claims are so intertwined with sexual harassment that they must be considered a species of the injury for which the legislature carved out an exception in Section 386-5).

HRS Section 657-7, Damage to persons or property, states:

> Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13.

HRS Section 657-7 applies to personal injury claims of negligent and intentional infliction of emotional distress and negligence. See, *Linville v. Hawaii,* 874 F.Supp. 1095 (D. Haw. 1994). Likewise, this two-year limit applies to claims of discriminatory employment practices under HRS Sections 378-2 and 378-62 because these statutes do not contain limitation periods. *Id.* at 1103.

Here, Horita contends that she may file a civil action for the infliction of emotional distress from KIUC's alleged discriminatory actions, to wit, the issuance of the November 18, 2005 Employee Counseling Report and the December 20, 2005 termination letter to her. HRS Sections 378-2, 386-5, *Takaki, Nelson, supra.* Additionally, Horita would have two years from the time of these events to file a civil action under HRS Section 657-7. *Linville, supra.*

Thus, Horita contends that as she filed her Court Complaint on July 3, 2007, within the two-year period of HRS Section 657-7, the District Court erred in determining that Horita's State Law Claims were untimely.

D. Alternatively, If the Time Limitation to File the EEOC Charge Began to Run Before December 20, 2005, There Is an Issue of Whether Equitable Tolling or Estoppel Applies Here Which Cannot Be Resolved by Summary Judgment

In *Aronsen v. Crown Zellerbach,* 662 F.2d 584 (9th Cir. 1981), plaintiff alleged that defendant-employer terminated him due to his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"). The district court granted summary in defendant's favor holding that plaintiff was terminated at a meeting on March 31, 1975 when he was notified of the termination, and except for one brief assignment, did no work for the company. Thus, plaintiff's filing of his notice of intent to sue on January 19, 1977 was untimely under the ADEA. *Id* at 592.

The Ninth Circuit in *Aronsen* stated that a mechanical formulae will not suffice to identify accurately the date of an unlawful practice, in light of the Supreme Court's decision in *Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed. 2d 431 (1980)(In a Title VII action, the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts becomes most painful.) The Ninth Circuit in *Aronsen* determined that in "Title VII, and analogously, ADEA discrimination suits inquiry for the purposes of determining when the limitation period begins to run must center on the date when the employee has notice of the unlawful act; neither succession of work

nor official termination noted on company personnel records is singularly relevant to this inquiry." *Id.* at 593. Moreover, review must proceed on a case-by-case approach. *Id.* at 594.

The Ninth Circuit in *Aronsen* determined that a factual dispute existed as to whether plaintiff knew or should have known on or before March 31, 1975 that he was being terminated or that he was being subjected to an unlawful practice. Therefore, it reversed the district court's determination. *Id.* 594.

The Ninth Circuit in *Aronsen* also noted that on remand, the issue of equitable tolling may arise. Although plaintiff did not raise the issue of equitable tolling as a distinct issue on appeal, it was raised before the district court. Moreover, the issue was interconnected with the same facts and arguments as the accrual date issue, thus defendant suffered no prejudice. *Id.* at 595.

The Ninth Circuit in *Aronsen* also stated that in ADEA cases, "equitable tolling or estoppel almost invariably involves the credibility of witnesses (and) (credibility) is difficult to determine from affidavits or depositions . . . Accordingly, summary judgment seldom will be appropriate when tolling is in issue." *Id.* at 595. The court further noted that in some equitable estoppel cases, the employer's conduct was found to hold out the possibility of reinstatement or otherwise to "lull" the employee into foregoing a timely filing. *Id.* at 595 n.22; *citing, Wilkerson v. Siegfried Insurance Co.,* 621 F.2d 1042, 1045-46 (10th Cir. 1980)(employee allegedly misled as to

reason for discharge); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595-596 (5th Cir. 1981) (Adopting equitable tolling in Title VII and ADEA cases. Plaintiff proffered evidence that defendant misrepresented to third party that it would reinstate plaintiff; defendant knew or had reasonably known that the third party would convey the misrepresentation to plaintiff; and plaintiff reasonably relied on the misrepresentation by forbearing to timely file his ADEA claim); *McCoy v. San Francisco, City & County*, 14 F.3d 28, 30 (9th Cir. 1994)(Issuance of written decision by defendant police commission constituted the discriminatory act rather that its oral decision rendered after hearing that triggers the statute of limitation, although plaintiff "knew" about defendant's decision after the hearing.)

In *Naton v. The Bank of California*, 649 F.2d 691 (9th Cir. 1981), the Ninth Circuit determined that plaintiff-appellant did not timely file his notice of intent to sue as to his ADEA claim, but considered whether equitable modification was appropriate. It stated two kinds of equitable modifications have been recognized: (1) equitable tolling which often focuses on the plaintiff's exclusive ignorance of the limitations period and on lack of prejudice to the defendant; and (2) equitable estoppel which usually focuses on the actions of the defendants. *Id.* at 696 (citations omitted). The Ninth Circuit also stated:

> Equitable modification of the limitations period may be appropriate when misleading conduct of the defendant has induced the

> plaintiff to delay filing notice of intent to sue. More specifically, in appropriate circumstances the defendant's records and correspondences may form the basis of equitable estoppel.
>
> A finding of estoppel must rest on consideration of several factors. Of critical importance is a showing of the plaintiff's actual and reasonable reliance on the defendant's conduct or representation. Also important is evidence of improper purpose on the part of the defendant, or the defendant's actual or constructive knowledge of the deceptive nature of its conduct. And, with respect to a claim for either tolling or estoppel, the trier should consider the extent to which the purposes of the limitations period have been satisfied, notwithstanding the delay in filing.
>
> We decline to evaluate these factors for the first time on appeal. Whether to grant equitable relief from the statutory provision is a matter that should be determined 'on a case-by-case basis, depending on the equities in each case.'

Id. at 696 (citations omitted).

In *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), the issue before the Fifth Circuit was whether the then-90 day statute of limitations of Title VII bars a suit by a plaintiff who did not learn nor in the circumstances could

reasonably have been expected to learn the facts that would support a charge of unlawful employment practice until after the 90-day period clearly passed. *Id.* at 925, citing, 42 U.S.C. § 2000e-5(d) (1970).

The Fifth Circuit in *Reeb* concluded there were circumstances in this case to excuse plaintiff from compliance of the 90-day requirement. The defendants in *Reeb* did not demonstrate, nor alleged any prejudice attributable to them by the failure to comply with the 90-day requirement. Also, the EEOC took the case on the merits, investigated, and issued the right to sue letter. Its action precludes the assumption that the case was stale simply because the 90-day period had elapsed. *Id.* at 930.

Moreover, plaintiff in *Reeb* alleged that defendant actively sought to mislead plaintiff in informing her that her position would be terminated because adequate funds would no longer be available, and facts that would alert a reasonable person to the unlawful discrimination only became known to the plaintiff more than six months after the discriminatory act where a less qualified male replaced her. *Id.* at 930.

In such circumstances, the Fifth Circuit in *Reeb* stated that the statute will not begin to run until the facts should be apparent to the person with a reasonably prudent regard for his rights. A corollary of this principle often found in cases where wrongful concealment of facts is alleged is that a party responsible for such wrongful concealment is estopped from asserting the statute of limitation as a

defense. *Id.* at 930; *see also, Oaxaca v. Roscoe,* 641 F.2d 386, 391 (5th Cir. 1981) (Moreover, plaintiff should be given an opportunity to establish facts that may entitle him to an equitable tolling or delay in the commencement of the running of the 30-day time period to contact an EEO Counselor).

In *Rhodes v. Guiberson Oil Tools Division,* 927 F.2d 876, *revd on other grounds,* 39 F.3d 537 (5th Cir. 1994), the district court dismissed plaintiff's ADEA claim against his employer because he failed to file his charge with the EEOC in a timely fashion. The employer represented to plaintiff that his position was being terminated due to a reduction in work force, and plaintiff accepted that representation in light of a recession in the oil industry. Plaintiff later discovered that defendant hired a younger person to replace him. Assuming the 180-day limit for his EEOC charge began on the date of his discharge, plaintiff's filing was late. *Id.* at 878.

The Fifth Circuit in *Rhodes* noted that under equitable estoppel, an employer is estopped from asserting the filing period if the employer misrepresented or concealed facts necessary to support a discrimination charge. If the defendant did conceal facts or mislead the plaintiff and thereby caused him not to assert his rights within the limitation period, the defendant is estopped from asserting the EEOC filing time as a defense. *Id.* at 879 (citations omitted).

The Fifth Circuit in *Rhodes* determined that the record showed that defendant's misstatement lulled

plaintiff into not approaching the EEOC sooner. Plaintiff only knew that defendant said it was reducing its work force, he would be terminated, and he was 56 years old. He had no reason to suspect that his age was the reason for his discharge. Moreover, the oil industry was in a recession and defendant's proffered explanation seemed credible. Thus, plaintiff was precluded from evaluating his legal options until he discovered that he was misled by the misrepresentations. Thus, the Fifth Circuit determined that equitable estoppel was applicable here. *Id.* at 880-881.

In *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979), plaintiff alleged defendant terminated his employment based upon his age in violation of the ADEA. Plaintiff filed his notice of intent to file a civil action with the Secretary of Labor. Thereafter, the Department of Labor advised plaintiff that it obtained defendant's voluntary compliance of the ADEA and that he would be reinstated. Plaintiff alleged that while he was awaiting reassignment, defendant induced him to forgo his ADEA rights by agreeing to hire him as a consultant. However, defendant later informed plaintiff that it would not honor the agreement. Plaintiff filed his civil action which the district court dismissed for being untimely filed almost seven and one-half months after the three-year period of limitation would normally have expired. *Id.* at 25-26.

The Sixth Circuit in *Ott* reversed the dismissal and determined that the jury should decide when and whether the defendant's acts in securing the

consulting agreement effected a tolling or suspension of the statute of limitations, and when and whether plaintiff discovered, or in the exercise of reasonable diligence, should have discovered that he had been wrongfully induced. Thus, if the jury finds that plaintiff was wrongfully led to forego his right to commence suit, it should compute the period of time within which plaintiff was thus deceived, and that time should not be charged against the three-year period for commencement of his action. *Id.* at 32-33.

In *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), plaintiff was employed by defendant whose employment was terminated due to a reorganization of the credit card department that left her with no work. Plaintiff contacted an attorney who advised her that an attorney was unnecessary and she should contact the Department of Labor to file a complaint, which she did. The Department attempted to conciliate plaintiff's complaint, but ultimately was unsuccessful. As a result, plaintiff filed her notice of intent to file a civil action, and then her civil action against defendant under the ADEA. However, the district court dismissed it determining that plaintiff untimely filed her notice of intent to file a civil action within the 180-day period under the ADEA, and that she was not entitled to equitable tolling. *Id.* at 1258-1259.

The Tenth Circuit in *Dartt* determined that the deadline to file a notice of civil action is subject to equitable tolling, and such tolling was appropriate here. It noted that plaintiff promptly sought private legal counsel, and filed her complaint with the labor

department. Plaintiff testified that she kept regular contact with the department, and that it was not until after the 180-day period had run that plaintiff was informed that in order to file a private lawsuit against defendant she needed to file a notice of intent to sue within 180 days of the alleged discriminatory act. Plaintiff retained another counsel who promptly filed the notice, although 36 days past the statutory time period. Thus, the Tenth Circuit held that in light of the circumstances in this case, and because of the de facto fulfillment of the main purposes of the ADEA (i.e., to provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh, and to give early notice to the employer of a possible lawsuit) the 180-day time limitation was tolled until the filing of plaintiff's notice of intent to sue. *Id.* at 1260-1262.

In *Wilkerson v. Siegfried Insurance Agency,* 621 F.2d 1042 (10th Cir. 1980), plaintiff sued defendant employer for wrongful termination due to age and sex in violation of the ADEA and Title VII, respectively. Plaintiff alleged that her employment was terminated on the pretext that her job was being eliminated, but she later learned that it was not abolished, and in fact had been filled by a younger person of the opposite sex. The district court granted summary judgment for defendant holding that plaintiff failed to timely file a notice of intent to sue with labor department for her ADEA claim, and failed to timely file her charge of discrimination for her Title VII claim. The district court also

determined that plaintiff was not entitled to equitable tolling based upon affidavits. *Id.* at 1044.

The Tenth Circuit in *Wilkerson* stated that in light of its decision in *Dartt, supra,* the issue of whether plaintiff was entitled to equitable tolling of the running of the statutory time period could not be resolved by summary judgment, and that such resolution required an evidentiary hearing. "Whether a case warrants a finding of equitable tolling or estoppel almost invariably involves the credibility of the various witnesses. Credibility is difficult to determine from affidavits, or depositions." *Id.* at 1045. The Tenth Circuit in *Wilkerson* noted it was not suggesting that there should be a finding of equitable tolling or estoppel in this case, but simply holding that the issue should be resolved after an evidentiary hearing. *Id.* at 1045.

In *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559 (11th Cir. 1987), plaintiff's ADEA action was dismissed in summary judgment for defendant employer because he failed to file a timely charge with the EEOC within the statutory filing period. The district court also determined that equitable tolling was unjustified because when plaintiff received notice of termination, he was cognizant of his ADEA rights, and was suspicious that he was the subject of discriminatory conduct. In the notice of termination, the defendant represented that it would try to find another position in the company for him. *Id.* at 1559.

The Eleventh Circuit in *Cocke* reversed the district court. It described the standard for equitable modifications and that summary judgment is often inappropriate when tolling is at issue in an ADEA case, citing, *Reeb* and *Naton, supra. Id.* at 1561. It further stated:

> Applying these principles, the Court holds that while the employer is actively trying to find a position within the company for the employee, the 180-day filing period of section 626(d)(1) is equitably tolled until such time as it is or should be apparent to an employee with a reasonably prudent regard for his rights that the employer has ceased to actively pursue such a position. This court's application of equitable tolling to the situation here is in harmony with the ADEA's purpose of facilitating informal conciliation.
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>
> It is too much for the law to expect an employee to sue his employer for age discrimination at the same time he is led to believe the employer is trying to place him in another job. The district court here, in holding the facts do not justify equitable tolling, placed too little weight on this practical situation. Although plaintiff was suspicious that the reason he had not been relocated prior to receiving notice of termination was because of his age, he may well have been justified in waiting before resolving that

> suspicion into a fact he should act upon during the time the employer made a good faith effort to relocate him. At least the situation presents a triable fact which cannot be disposed of on summary judgment.

Id. at 1561-1562.

In *Pearson v. Macon-Bibb County Hospital Authority*, 952 F.2d 1274 (11th Cir. 1992), plaintiff, a black female nurse, sued defendant employer for unlawful termination in violation of Title VII, among other claims. On October 16, 1985, defendant informed plaintiff that it decided to terminate her employment, but gave her the option to resign and seek employment at another hospital, or apply for a transfer to another section within the hospital. If plaintiff refused either option, she would be terminated. Plaintiff advised defendant that she wished to seek a transfer to another hospital section, and sought a position in the hospital Emergency Center, but was told there was no opening available in that area. When offered a position within the Urgent Care Position, plaintiff declined. Thereafter, plaintiff took a medical leave of absence, and was ultimately administratively terminated on January 21, 1986. Plaintiff filed her discrimination charge with the EEOC on April 28, 1986, 194 days after the notice of termination. *Id.* at 1277.

The district court in *Pearson* entered summary judgment against plaintiff as to her Title VII claim. It found that she failed to timely file her claim with EEOC within the 180 days of the alleged unlawful

employment practice per 41 U.S.C. § 2000e-5(c). *Id.* 1279.

The Eleventh Circuit in *Pearson* determined as plaintiff was invited to seek a transfer as an alternative to termination, there are material issues of fact with respect to the issue of equitable tolling of the 180-day filing period. Thus, there needed to be a trial on the issue of availability of equitable tolling on the facts. *Id.* at 1270-1280, *citing, Cocke* and *Reeb, supra.*

In *Stewart v. Booker T. Washington Insurance,* 232 F.3d 844 (11th Cir. 2000), plaintiff claimed that defendant-employer discriminated against her by transferring, terminating, and failing to rehire her on account of her sex and in retaliation for having filed a previous charge with the EEOC. Defendants contended that plaintiff received notice of her termination in May 1997 when she learned that employer's radio stations would be sold at which time all employees would be terminated. Plaintiff testified by affidavit that during the summer and fall of 1997 after defendant announced that its radio stations would be sold, many employees were offered interviews by the new owners. Plaintiff believed that she was not offered an interview because she believed she would continue working for defendant's affiliated companies. By exit interview on November 3, 1997, plaintiff was told she was being terminated and her last day of work was November 21, 1997. *Id.* at 847.

The district court agreed with defendant that plaintiff received notice of her termination in May 1997, therefore she did not file a charge with the EEOC within 180 days of the alleged unlawful practices, as required by 42 U.S.C. § 2000e-5(e)(1). *Id.* at 847.

The Eleventh Circuit in *Stewart* determined that the district court erred in determining that plaintiff's EEOC charge of discriminatory and retaliatory termination was untimely filed and therefore also erred in granting summary judgment to the defendants. The defendants did not present any clear evidence that the decision to terminate plaintiff was made or communicated to her before November 20, 1997. Moreover, the district court improperly discredited plaintiff's testimony that she was never told before November 20, 1997 that she was or would be terminated. Since the charge filing period on a termination claim does not begin to run until an employee is told that she is actually being terminated (not that she might be terminated if future contingencies occur), and plaintiff filed a charge with the EEOC within 180 days of November 20, 1997, the district court erred in granting summary judgment to the defendants. *Id.* at 848.

Also, the Eleventh Circuit in *Stewart* noted that based on the testimony of the president of the defendant companies, rather than establishing that defendants' employees, presumedly including plaintiff, were unconditionally told in May 1997 that they would be terminated, it appeared the employees were told in a general meeting that defendants were

concerned that the employees' jobs *may* be in danger, but that nothing was definite. Although plaintiff may have had a reason, based on the May 1997 meeting, to suspect that she *might* be terminated as a result of the sale of the stations, this was not enough to start the charge filing period running. The 180-day period does not run until plaintiff is told that she is actually being terminated, not that she might be terminated if future contingencies occur. *Id.* at 849 (emphasis added); *see also, Wright v AmSouth Bancorporation,* 320 F.3d 1198 (11th Cir. 2003)(In an ADEA case, when an employee is left simply to infer and deduce that he may be terminated from the surrounding events, no unequivocal communication of an adverse employment decision has occurred; a plaintiff must be told that he is actually being terminated before the 180-day filing period begins to run.); *Loe v. Heckler,* 768 F.2d 409, 421 (D.C. Cir. 1985)("To insist that plaintiff have anticipated her employer's dishonoring its Title VII commitment would require that we attribute either the vision of Cassandra to employees or universal bad faith to employers. Title VII does not mandate preemptive strikes as a precondition to judicial oversight of subsequent misconduct.")

Here, Horita contends that if the Ninth Circuit determines that the 300-day limitation period to file the EEOC charge was before December 20, 2005, then equitable estoppel should apply here. Achenbach represented to the Human Resources staff at the September 2, 2005 meeting that the Human Resources Department would be

"outsourced" as recommended by the assessment done by NRECA. However, if Human Resources were to remain in-house, then Horita and Shimokawa would get their jobs back. Horita relied upon that representation.

However, when Horita received the December 20, 2005 letter advising of her termination on January 1, 2006, Horita realized that Achenbach's September 2, 2005 representation that she and Shimokawa would get their jobs back if Human Resources remains in-house, which it is, was untrue. As a result, Horita filed her EEOC Charge on September 21, 2006 which is within the 300-day limitation period if December 20, 2005 was the trigger date. The EEOC accepted her Charge, and ultimately issued her a right to sue letter on May 25, 2007.

Thus, as discussed above, the courts have held that the time limitation to file an EEOC charge may be subject to equitable tolling or estoppel. *Aronsen, Coke, Reeb, Rhodes, Oaxaca, Ott, Loe, supra.* Additionally, determining whether a plaintiff is entitled to equitable tolling or estoppel cannot be determined by summary judgment. *Dartt, Wilkerson, Cocke, Pearson, Stewart, supra.* Horita contends that the District Court erred in granting summary judgment in favor of KIUC based on the timeliness of her EEOC Charge.

VIII.

CONCLUSION

Therefore, for the foregoing reasons, Horita requests that the Ninth Circuit reverse the District Court's Order granting summary judgment and judgment in KIUC's favor as to Horita's Title VII and State Law claims, and remand this matter for further adjudication.

DATED: Honolulu, Hawaii, January 12, 2009.

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